



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-95-11

### FACTS:

Until last year, you were Chairman of the Zoning By-law Study Committee in a town (Town). The Committee, which was established by and reports to the Board of Selectmen, is made up of town residents and has been assigned the project of revising and restructuring the Town's zoning bylaws. The Committee intends to completely revise and rewrite the entire zoning bylaws rather than recommend amending only certain parts.

Although you no longer reside in the Town, the Board of Selectmen would like to retain you as paid counsel to assist the Committee in preparing the revised zoning bylaws because current Committee members are not familiar with certain legal requirements of zoning.

Your private law practice occasionally requires you to represent clients before the Town's boards and agencies.

### QUESTIONS:

1. May you represent property owners before the Zoning Board of Appeals or other authorities in Town?
2. After the new zoning bylaws are enacted, may you represent clients before the Zoning Board of Appeals or other Town authorities?

### ANSWER:

1. Yes, subject to the limitations set forth below.
2. Yes, subject to the limitations set forth below.

### DISCUSSION:

If you were to be retained by the Town as legal consultant to the Committee, you would become a municipal employee.<sup>1/</sup> *EC-COI-87-8*. Sections 17, 18, and 23 of the conflict law apply to your questions.

### Restrictions as a current municipal employee

#### Section 17

Section 17(a) prohibits a municipal employee from receiving compensation<sup>2/</sup> from anyone, other than the municipality, in connection with a particular matter<sup>3/</sup> in which the municipality is a party or has a direct and substantial interest. In addition, §17(c) prohibits a municipal employee from acting as an agent or attorney for anyone other than the municipality in any claim against the municipality or in connection with any particular matter in which the municipality has a direct and substantial interest.

The broad sweep of §17 would preclude you as a current municipal employee from representing private parties in any matter in which the Town had a direct and substantial interest, not only matters involving the Zoning Board of Appeals, zoning issues or other permit granting authorities. *See e.g., EC-COI-89-30; 88-21.*

Section 17 would apply somewhat less restrictively to you, however, if you were designated a special municipal employee.<sup>4/</sup> A special municipal employee is subject to the restrictions of §17(a) and (c) only in relation to a particular matter (a) in which he has at any time participated<sup>5/</sup> as a municipal employee, or (b) which is or within one year has been subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) does not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.<sup>6/</sup>

For example, if you were a special municipal employee as a consultant to the Committee, you would be prohibited from also representing a client seeking to amend the zoning bylaws because amending the bylaws would constitute a particular matter in which you participated or which was within your official responsibility.<sup>7/</sup> Section 17 would not, however, preclude you from representing private clients in zoning and permitting issues where you were retained only to interpret and apply the current bylaws or in matters involving other municipal agencies or boards.

If you were to serve for more than sixty days during a three hundred and sixty-five day period, however, the §17 prohibition would apply to any particular matter pending before the agency you serve. In your case, the Committee was established by and reports to the Board of Selectmen. Therefore, you could not represent private clients or be compensated by anyone other than the Town in connection with a particular matter before the Board of Selectmen.

## **Section 23**

Section 23 describes standards of conduct that apply to all public employees. Section 23(b)(2) provides that no municipal employee may use his official position to secure unwarranted privileges or exemptions for himself or others. Section 23(b)(3) prohibits a municipal employee from engaging in any conduct which gives a reasonable basis for the impression that any person or entity can improperly influence or unduly enjoy his favor in the performance of his duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. If there is an appearance of a conflict under §23(b)(3), you must file a written disclosure in advance to your appointing authority of all the facts and circumstances about the matter and continue to perform your Committee work using objective criteria. *EC-COI-89-19*. For example, a challenge to the validity of a current zoning bylaw could raise concerns under §23 if the issue were peculiar to your client and the same issue were being contemplated by the Committee.

Finally, §23(c) prohibits a municipal employee from engaging in any business or professional activity that will require him to disclose confidential information which he has gained by reason of his official position or authority and from improperly disclosing such confidential materials<sup>8/</sup> or using such information to further his private interests.<sup>9/</sup>

## **Restrictions after municipal employment**

### **Section 18**

Section 18(a) prohibits a former municipal employee from acting as an agent or attorney for, or receiving compensation from, anyone other than the municipality or a municipal agency in connection with any particular matter in which the municipality or a municipal agency is a party or has a direct and substantial interest *and in which he participated* as a municipal employee.

Section 18(b) prohibits a former municipal employee, for one year, from appearing personally<sup>10/</sup> before any officer or agency of the municipality as an agent or attorney for anyone other than the municipality or a municipal agency in connection with any particular matter in which the municipality is a party or has a direct and substantial interest *and which was under official responsibility*<sup>11/</sup> any time within a period of two years prior to the termination of his municipal employment.

As a former legal consultant to the Committee, you will be barred from working for anyone other than the Town in challenging the validity, or supporting the wisdom,<sup>12/</sup> of the Town's revised zoning bylaws because you participated in their revision. The only particular matter that will be under your official responsibility also will

be the only matter in which you participate as a municipal employee — the revision of the zoning bylaws. Therefore, the prohibition under §18(b) will be subsumed under §18(a).<sup>13/</sup>

The Commission has concluded that regulations, once promulgated, are not “particular matters” as defined in §1(k), however, “the process by which they are adopted and the determination that was initially made as to their validity will be considered particular matters.” *EC-COI-81-34*. See also, *EC-COI-87-34*; *85-11*. Although we concluded in *EC-COI-85-22* that a proposed zoning amendment is a particular matter under §1(k),<sup>14/</sup> we have not heretofore determined whether a comprehensive revision of zoning bylaws should be analyzed, for the purposes of the conflict law, in the same manner as the creation of regulations. Applying our analysis in *EC-COI-87-34*, we conclude that the revision process should receive the same treatment under the conflict law.

In *EC-COI-87-34*, a state employee had reviewed a draft of proposed regulations, suggested changes, and met with industry representatives regarding the draft. As a former state employee, he then wished to represent private clients in discussions with state officials in connection with promulgating the draft. We concluded that because the employee had participated personally and substantially in the promulgation process and made decisions about the public policy of some or all of the regulations, he was permanently prohibited from challenging the wisdom or legality of the draft regulation.

The underlying principle in our reasoning was that former public employees should not be able to attack regulations they helped create. *EC-COI-87-34*. As in that case, there may be circumstances in which your private clients’ challenges to the revised bylaws raise the same issues being addressed in your Committee work. Therefore, your consulting work to rewrite the zoning bylaws and a challenge by your private client to the validity of those bylaws would involve the same determination or particular matter.

Once the revised bylaws have become effective, you may represent private parties in cases related to the interpretation or application of the new bylaws. *EC-COI-87-34*. The goal of §18 is not to bar former public employees from benefitting from the general subject-matter expertise they acquired in government service, but rather from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer. *EC-COI-92-17*.<sup>15/</sup> Lawyers who develop an area of expertise should not be prohibited from representing clients in that area because such a prohibition would unduly restrict their practice and deprive their clients of needed expertise. *EC-COI-87-34*.<sup>16/</sup>

**DATE AUTHORIZED: October 19, 1995**

<sup>1/</sup>“Municipal employee,” a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

<sup>2/</sup>“Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

<sup>3/</sup>“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>4/</sup>“Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of

more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

<sup>5</sup>“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>6</sup>The calculation of the sixty-day limit is based upon the following factors. First, a day is not counted unless services are actually performed for the Town on that day. Second, if you serve only part of day for the Town, you will be considered to have served for a complete day. Third, if you assign one of your firm’s associates to perform the work under your supervision, you will be considered as having performed billable services on such days. *See EC-COI-85-49*.

<sup>7</sup>See discussion *infra* under Section 18.

<sup>8</sup>The materials are defined as “materials or data within the exemption to the definition of public records as defined by G. L. c. 4, §7.” G. L. c. 268A, §23(c)(2).

<sup>9</sup>As legal consultant to the Committee, you also will be subject to additional restrictions under §19. The pertinent restriction is that a municipal employee may not participate in any particular matter in which he, an immediate family member or partner, a business organization in which he is an officer, director, trustee, partner, or employee has a reasonably foreseeable financial interest. Such a financial interest may be of any size and may be either positive or negative but it must, however, be direct and immediate or reasonably foreseeable in order to implicate §19. *EC-COI-86-25; -123; 84-96*. You could not, for example, continue to revise the zoning bylaws if you or any of the interested parties under §19 had a reasonably foreseeable financial interest in the outcome of your official work.

If there is such an interest, however, you may qualify for an exemption. Under §19(b)(1), you may participate in a particular matter affecting such a private financial interest if, *prior to participating*, you (1) advise your appointing official of the nature and circumstances of the particular matter; (2) make a full written disclosure to your appointing official of the financial interest; and (3) receive a *written* determination in advance from your appointing official that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town.

For example, §19 issues would be raised if other members of your firm were to represent a client for a fee when the client sought to expand a commercial zoning district to include a site formerly restricted from commercial development. We have presumed that a law firm has a financial interest in all matters in which it represents a client for a fee. *EC-COI-89-5 n. 7*.

<sup>10</sup>Appearing personally includes the submission of written correspondence, telephone calls, or any contact with the intent to influence. *See EC-COI-87-27*.

<sup>11</sup>“Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

<sup>12</sup>*See EC-COI-87-34 n. 1*.

<sup>13</sup>We do not have sufficient information about the Committee to determine whether it constitutes a municipal agency under the conflict law. *See e.g. EC-COI-88-2 and 85-22* (for discussions of the criteria required to make such a determination). If the Committee were deemed to be a municipal agency, then, as a former Chairman, you would be considered now to be a former municipal employee. As such, the advice under §18 currently would apply to you. In the event you decide not to accept employment as a legal consultant for the Town and you intend to represent private clients before the Town in matters involving the revised zoning bylaws, you should seek further guidance from the Commission in order to determine whether your prior participation as Chairman of the Committee constituted municipal employment under the conflict law.

<sup>14</sup>The proposed amendment in that case was needed to allow developing a specific multifamily housing project.

<sup>15</sup>“[O]nce the regulation is in final form, there exists a permissible scope of representation. . . . [A] former state employee may properly represent a private party in a case related to the interpretation or application of a regulation which he had previously participated in drafting as a state employee. This interpretation is consistent with the policy that lawyers who develop a specialized area of expertise should not be perpetually precluded from representing private clients in that area of expertise. Such a ban would unduly restrict the livelihood of specialized attorneys and deprive clients of needed expertise. . . . [S]uch representation may *not* include an attack on the validity of the regulations.” *EC-COI-87-34* (emphasis added).

This paragraph allows the restrictions of §18(b) to be applied less restrictively to counsel whose legal services for a municipality may have had a limited scope. The implication is that such counsel should not be overly restricted in other matters simply because of his rather limited municipal employment. In your circumstances, however, we need not decide whether you would be considered a former “town counsel” under this paragraph because this restriction would apply neither to your compensation from the Town nor to the

scope of your private practice before Town agencies. Whether you were to receive more or less than two thousand dollars per year for your Committee work would not change the effect of §18(b)'s restrictions upon your private practice because you would have had official responsibility over and participated in only the revision of the zoning bylaws.

<sup>16</sup>You also ask whether §18 would impose a limit on your compensation for your services to the Committee in order to permit you to appear before the Zoning Board of Appeals or other Town boards after you complete municipal employment. This question relates to the following paragraph in §18:

Notwithstanding the provisions of clause (b), a former town counsel who acted in such capacity on a salary or retainer of less than two thousand dollars per year shall be prohibited from appearing personally before any agency of the city or town as agent or attorney for anyone other than the city or town *only* in connection with any particular matter in which the same or town is a party or has a direct and substantial interest *and in which he participated* while so employed. (emphasis added)

<sup>17</sup>You should also note that §§18(c) and (d) may apply to your fellow attorneys in your law practice. Under these provisions, the partners of a former municipal employee are subject to the same restrictions as the municipal employee. The Commission has concluded that the term "partner" is not limited to formal partnership agreements. *See e.g., EC-COI-93-24; 93-9; 85-62.* Because the letterhead for your law practice includes the designation "P.C.", we call your attention especially to the analysis in *EC-COI-93-24* about whether a law practice set up as a professional corporation is considered a partnership under the conflict law. In that case, we concluded that a professional corporation was not a partnership. Should your law practice's professional corporation not meet the tests of that analysis, you should seek further guidance from the Commission.